

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Appropriate Framework for Broadband)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities)	
)	
Universal Service Obligations of Broadband)	
Providers)	
)	
Computer III Further Remand Proceedings:)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	
Review – Review of Computer III and ONA)	
Safeguards and Requirements)	

**COMMENTS OF MESCALERO APACHE TELECOM, INC.
TO NOTICE OF PROPOSED RULEMAKING**

Godfrey Enjady
Mescalero Apache Telecom, Inc.
P.O. Box 229
Mescalero, New Mexico 88340

David S. Cohen
Jane C. Cohen
Cohen & Cohen, PA
P.O. Box 789
Santa Fe, New Mexico 87504-0789
(505) 983-9277

General Manager

Attorneys for Mescalero Apache Telecom, Inc.

May 3, 2002

Mescalero Apache Telecom, Inc.
May 3, 2002

TABLE OF CONTENTS

SUMMARY OF POSITION	i
I. Description of MATI.....	1
II. The NPRM should be Consistent with the FCC’s Policy to Increase Deployment of Telecommunications Services in Indian Country	3
III. The FCC should not Adopt the NPRM unless Certain Policy Objectives are Maintained and Fostered	5
IV. The Adoption of the NPRM Threatens the Financial Viability of Tribal and Other High Cost Area Telecommunications Carriers	8
V. Less Drastic Means are Available to Remove Regulatory Barriers to Broadband Deployment	11
VI. Conclusion	13

SUMMARY OF POSITION

Mescalero Apache Telecom, Inc. (“MATI”) opposes the redefinition or reclassification of wireline broadband Internet access services as “information services” subject to Title I regulation under the Communications Act of 1934 (“Act”)¹ because of the grave economic consequences upon MATI’s, as well as other tribal and rural telecommunications carriers’, ability to maintain Federal High Cost Fund support (“FHCF”), Local Switching Support (“LSS”), Long Term Support (“LTS”), and Interstate Common Line Support (“ICLS”) (collectively “*Federal Support*”) at their current levels. The operation of Part 64.901 joint and common plant² (para. 63 of the Notice of Proposed Rulemaking (“NPRM”)) coupled with Section 254(k) of the Act (para. 83 of NPRM) would potentially reduce MATI’s *Federal Support* by 50 percent or more. This would destroy MATI as a going concern.³ MATI also opposes the NPRM because it is inconsistent with the FCC’s policy of encouraging the deployment of telecommunications services on Indian lands. In addition, assuming the deployment of broadband service pursuant to the NPRM, the NPRM does not address the affordability of broadband service to consumers in Indian Country and other high cost rural areas if the NPRM is adopted.

There are less drastic means available to the FCC to stimulate the deployment of broadband services in rural high cost communities than that proposed in the NPRM. In the

¹ 47 USC 151 *et seq.* We refer to the Communications Act of 1934, as amended by and including the Telecommunications Act of 1996, as the “Act.”

² 47 C.F.R. pt. 64.901. For fiscal year 2001 MATI on an annualized basis (MATI was only operational for nine months) received \$956,464.00 in FHCF, \$201,536.00 in LSS, \$0 in LTS. ICLS amount is unavailable.

³ MATI’s loopline cost is \$1,035.23 per access line. MATI’s *Federal Support* per line is \$958.61. Clearly, without the continued current *Federal Support*, MATI’s customer costs would not be affordable to its customers. *See also*, the Comments of Beacon Telecommunications Advisors, LLC filed in this proceeding, which comments MATI, for the most part, supports.

final analysis, MATI believes that the NPRM will not create any regulatory or financial incentives to provide broadband service to rural and tribal communities. It will have the opposite effect. MATI would support, however, an exemption for high cost area carriers from the scope of the NPRM so long as *Federal Support* payments are not reduced as a consequence.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Appropriate Framework for Broadband)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities)	
)	
Universal Service Obligations of Broadband)	
Providers)	
)	
Computer III Further Remand Proceedings:)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	
Review – Review of Computer III and ONA)	
Safeguards and Requirements)	

**COMMENTS OF MESCALERO APACHE TELECOM, INC.
TO NOTICE OF PROPOSED RULEMAKING**

MATI submits its initial comments to the Federal Communications Commission's ("FCC") NPRM in this Docket. In particular, MATI's comments address the regulatory and economic impact upon MATI and other Indian tribal telecommunications enterprises as a consequence of redefining or reclassifying broadband access to the internet over wireline facilities to be an "information service" under the Act.

I. Description of MATI

MATI is a tribally-owned telecommunications carrier providing telecommunications services to the residents of the Mescalero Apache Indian Reservation ("Reservation") in rural south central New Mexico. MATI was incorporated by the Mescalero Apache Tribe ("Tribe") as a tribal enterprise in order to provide modern and state of the art

telecommunications services to its Members residing on the Reservation. Toward that end, MATI acquired the telecommunications facilities of GTE of the Southwest (“GTE”) in March, 2001. At the time of its acquisition of the GTE facilities, only 42 percent of the Reservation’s population had access to basic telephone service – compared to over 94.6 percent of the American population. The GTE facilities were antiquated, in poor condition and ill-equipped to provide any expansion of basic telephone service, let alone advanced telecommunications services, to the Reservation’s residents.

In its one year operational existence, MATI has been able to achieve remarkable successes:

- MATI has increased its access lines from 950 to 1449;
- MATI has constructed over 90 miles of fiber line within the Reservation and has installed and is operating its central office with state of the art digital switching equipment including a full digital switch and full digital remotes running on a fiber sonnet;
- MATI has recently completed the installation of necessary broadband facilities to make Digital Subscriber Line (“DSL”) service available to every household on the Reservation;
- MATI has agreed to a State of New Mexico Public Regulation Commission (“NMPRC”) requirement that it freeze the basic retail service rates it inherited from GTE for a five year period;
- MATI has fulfilled its commitment to the FCC not to charge new customers line extension charges for service; and,

- MATI provides all necessary telecommunications services to maintain the public health, safety and welfare of the Reservation's residents.

Based upon year end annualized 2001 unaudited figures, MATI's total revenues were approximately \$2,500,000.00. Of these total revenues, *Federal Support*⁴ comprised approximately \$1,150,000.00 and subscriber revenues comprised approximately \$300,000.00. MATI's year end annualized operating expenses were approximately \$2,300,000.00 and debt service was approximately \$162,000.00. MATI's unseparated loop cost per access line was \$1,035.23, which cost was supported by \$958.61 in *Federal Support*. MATI anticipates that its revenues will increase in the future because of the likelihood of increased network access revenues, ICLS revenues, and customer growth.

The FCC and the NMPRC have played an important role in making MATI this successful reality.⁵

II. The NPRM should be Consistent with the FCC's Policy to Increase Deployment of Telecommunications Services in Indian Country

On June 8, 2000, following a two year process, the FCC adopted an Indian policy to overcome impediments to increased telecommunications deployment and subscribership on

⁴ See Summary, *supra*, for components of *Federal Support*.

⁵ MATI's successes are in large part due to the FCC's action in Docket No. 96-45 (FCC01-13;DA 01-129). In those proceedings, the FCC recognized the unique circumstances confronting MATI and granted MATI waivers from FCC rules which enabled MATI to obtain immediate access to the universal service fund. The NMPRC approved MATI's acquisition of the GTE system and granted it eligible telecommunications carrier status. *In the Matter of the Application of Mescalero Telecom, Inc. for Certificates of Financial and Technical Competency, Operating Authority, and Public Convenience and Necessity and for Approval of Initial Tariffs*, New Mexico Public Regulation Commission, Utility Case No. 3664 (Final Order, August 15, 2000). In so doing, the NMPRC encouraged and urged the FCC to grant MATI the needed waivers from the FCC rules to become an economically viable telecommunications carrier. *Id.* at 29.

tribal lands of American Indians.⁶ The FCC adopted its Indian policy in part because it is:

...consistent with our [FCC] obligations under the historic federal trust relationship between the federal government and federally recognized Indian tribes to encourage tribal sovereignty and self governance. Specifically, by enhancing tribal communities' access to telecommunications and information services, we increase their access to education, commerce, government, and public services. Furthermore, by helping to bridge the physical distances between low-income consumers on tribal lands and the emergency, medical, employment, and other services that they may need, our actions ensure a standard of livability for tribal communities.⁷

The FCC found that approximately 94 percent of all households in the United States had telephone service, whereas only 47 percent of Indian tribal households had telephone service.⁸ The FCC also found that the following factors impeded the advancement of universal service on tribal lands: depressed economic conditions, low per capita incomes, the cost of basic service in certain areas, the cost of intrastate toll service, inadequate telecommunication infrastructure, the cost of line extensions and facilities deployment in remote, sparsely populated areas, and the lack of competitive service providers offering alternative technologies.⁹

To partially address the absence of telecommunications deployment on tribal lands, the FCC adopted enhanced *Lifeline* support¹⁰ and expanded *Link-Up* support.¹¹ The FCC

⁶ See *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 00-208, para. 23 (rel. Jun. 30, 2000) (*Twelfth Report and Order*), stayed in part by *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Order and Further Notice of Proposed Rulemaking, FCC 00-322 (rel. Aug. 31, 2000), as corrected by Errata, CC Docket No. 96-45, DA 00-2128 (Com Car. Bur. Rel. Sep. 20, 2000).

⁷ *Id.* at ¶5; see also ¶23.

⁸ *Id.* at ¶¶ 25, 26.

⁹ *Id.* at ¶20.

¹⁰ *Id.* at ¶¶36-38.

¹¹ *Id.* at ¶¶59-67.

stated that its policy objective was to encourage the availability of a predictable and secure revenue source to create incentives for the deployment of telecommunications facilities in high risk and unprofitable areas such as Indian lands.¹² Indeed, in granting MATI waivers to the FCC's Section 54.305 rules, the FCC specifically applied its Indian policy objectives. "By granting this waiver we will enhance Mescalero Apache tribal communities' access to telecommunications, including access to inter-exchange services, advanced telecommunications and information services, and thereby increase the tribal communities' access to education, commerce, government, and public service."¹³

The Indian policy should serve as a guide and be maintained in this proceeding. As discussed below, the adoption of the NPRM's definition or classification of "information services" would undermine this policy because of its potential for severely reducing the *Federal Support* currently available to and necessary for Indian tribes and other high cost area carriers who desire to deploy, or who, as in MATI's case, have deployed basic and advanced telecommunications services to their underserved communities.¹⁴

III. The FCC should not Adopt the NPRM unless Certain Policy Objectives are Maintained and Fostered

As noted above, within one short year of operating history, MATI has successfully deployed broadband DSL service to its customers. This success was achieved in no small measure as a consequence of the FCC's willingness to be flexible in waiving certain of its rules.¹⁵ These waivers enabled MATI to expand basic telephone service to the very large

¹² *Id.* at ¶¶52-53.

¹³ *In the Matter of Mescalero Apache Telecom, Inc., Waiver of Section 54.305 of the Commission's Rules*, CC Docket No. 96-45, FCC 01-13, Order, ¶11 (rel. January 18, 2001)

¹⁴ See, 47 C.F.R. pt. 64.

¹⁵ *Id.*; See also, *Mescalero Apache Telecom, Inc. Waiver of Sections 61.41(c)(2), 69.3(e)(11), and 36.611 and 36.612 of the Commission's Rules*, CC Docket No. 96-45, Order, DA 01-0129 (rel. Jan. 18, 2001). See also, the Comments of Beacon Telecommunication Advisors, LLC filed in this proceeding.

number of unserved residents of the Reservation and make broadband service a reality for Reservation residents.

This rule flexibility coupled with the level of *Federal Support* available under the current FCC regulatory regime were the linchpins to MATI's ability to immediately become an economically viable enterprise and provide ubiquitous broadband service. This success was achieved under the current FCC policies because the FCC exercised the necessary discretion to insure universal service based upon the unique circumstances confronting MATI.¹⁶ Other tribal communities and high cost area carriers require this same rule flexibility and *Federal Support* to become economically capable of providing basic and advanced telecommunications services. See, *infra* pages 10-11.

The major policy shift proposed in this NPRM with the attendant certainty of unintended consequences, which are contrary to the Act and FCC existing policy, may not be warranted at this time for the industry as whole and, as described below, would have a significant negative effect on MATI, its customers and the Mescalero Apache Tribe, as well as other tribes that would like to achieve for their members what MATI has accomplished in telecommunications for the Mescalero Apache Tribe. In fact, a faulty assumption which suggests that the FCC's current regulatory regime has substantially contributed to the unavailability of broadband service may underlie the NPRM. The investment decisions of telecommunications carriers not to provide broadband services are also attributable to

¹⁶ *In the Matter of Mescalero Apache Telecom, Inc. Waiver of Section 54.305 of the Commission's Rules*, CC Docket No. 96-45, at paras. 6, 7, 8, 9, 10, FCC 01-13 (rel. Jan 18, 2001).

economic conditions in the industry and the economy as a whole and the business priorities of existing and potential carriers. The bottom line is that the profitability of a given deployment decision compared to other investment opportunities drives corporate decision-making. It is not clear how the proposed policy shift impacts this reality, especially in high cost areas.

Thus, in assessing the shift in policy proposed in this NPRM, as well as the other related NPRMs addressing the scope, regulation and financing of broadband deployment, MATI urges the FCC to be cognizant of MATI's experience, the elements necessary for the successful initiation and operation of tribal telecommunications companies, and the requirements necessary for MATI's continued success. First and foremost, the NPRM must not in anyway diminish the existing *Federal Support* available to MATI, tribal carriers and other high cost area carriers. For rural communities, especially Indian communities, the current level of *Federal Support* must be maintained if not enhanced to achieve the goals of the Act.

Second, the FCC rules, whether under the existing or proposed broadband regime, must be flexibly administered to address the unique circumstances of Indian tribes attempting to enter into the telecommunications market place as start up service providers to their high cost communities. Thus, subscriber incremental cost contributions associated with the policy shift should be waived for these poor, depressed, and grossly underserved communities. Tribal and other high cost area carriers should not be penalized by having their *Federal Support* contributions increased either in the absence of or as a result of broadband build-out. Similarly, high cost area carriers should not have their share of *Federal Support* decreased, whether actual build-out occurs or not, in their cost area.

Third, the expansion of broadband service should not be discouraged by adopting policies that limit the affordability of the service in rural high cost areas. Subscribers in high cost areas, particularly those eligible for *Lifeline* and *Linkup* programs, should not suffer the unintended consequences of supporting the build-out while not being able to afford basic services. Indeed, these customers would not be able to afford these services without a concomitant overhaul of the universal service system to include broadband subsidies. There is simply no evidence to suggest that these customers can afford broadband service, if deployed, at three or four times the cost of basic services. Thus, *Lifeline* and *Linkup* exemptions from *Federal Support* contributions must be supported and not eliminated, and broadband subsidies should be adopted for *Lifeline* and *Link-up* customers as part of any program to provide incentives to the deployment of broadband.

Fourth, high cost area carriers, such as MATI, that have already deployed broadband service should not be penalized for making the investment decision to deploy broadband service by reducing their share of Part 64 joint and common costs¹⁷ by the amount of their investment in unregulated service facilities, as proposed in this NPRM -- that is, the actual ubiquitous deployment of broadband service should not result in an economic penalty. Finally, low cost carriers should not be allocated any *Federal Support* to deploy broadband services if such allocation would dilute the current levels of *Federal Support* to high cost carriers.

IV. The Adoption of the NPRM Threatens the Financial Viability of Tribal and Other High Cost Area Telecommunications Carriers

Unless modified, the NPRM will result in severe, uncorrectable economic harm

¹⁷ 47 CFR pt. 64.901.

to and perverse consequences on the operations and viability of tribal and other high cost area telecommunications carriers as going concerns. For example, MATI has invested substantial effort and sums in developing its state of the art telecommunications network. It has invested millions of dollars in its loop and central office facilities from loans made by the Department of Agriculture, Rural Utilities Service. A significant portion of that investment, approximately 50 percent, is in facilities that are broadband-equipped and capable. MATI's repayment of these loans is dependent upon the stream of revenues available under the existing *Federal Support*.¹⁸ Based upon MATI's unaudited year end operating results noted above, *supra* at page 3, the elimination or significant reduction in *Federal Support* would financially threaten MATI as a going concern.

Under the current FCC regulatory regime, most of the costs for Title II broadband – equipped and capable facilities are considered “regulated facilities.” As such, tribal telecommunications carriers and other high cost area carriers would be entitled to *Federal Support* to fund these investments. If the FCC adopts the NPRM policy of categorizing broadband services as “information services” not subject to Title II regulation, then, under the FCC's Part 64 regulations¹⁹ and the operation of the Federal High Cost Fund algorithm, a substantial portion of a rural telecommunications carrier's joint and common loop costs would no longer be eligible for *Federal Support*. This would be ruinous for a carrier that acted and invested in reliance on existing *Federal Support* policy. Furthermore, adoption of the proposed broadband categorization would be a disincentive, rather than an incentive, to broadband investment in rural areas.

¹⁸ It is highly unlikely that the RUS would loan funds to other Indian tribes seeking to deploy advanced telecommunication services if the collection of adequate *Federal Support* was not predictable or secure.

¹⁹ 47 C.F.R. pt. 64.

Specifically, the proposed broadband policy would result in the following unpalatable consequences for high cost carriers in rural areas. For those high cost area carriers that have not as yet invested in broadband service, any incentive to do so would be eliminated. Those carriers would be faced with the unacceptable option of either receiving a reduction in their *Federal Support* if they deploy broadband services, or substantially increasing their customers' basic and broadband service charges to unaffordable levels. For those high cost area carriers, such as MATI, that have already invested in broadband facilities, the consequences are far more dire. *Federal Support* would be immediately and substantially reduced. MATI, for example, could lose more than 50 percent of its support payments. Consequently, the rural telecommunications carrier would be compelled to raise its customers' rates for both basic service and broadband service to unaffordable levels, ultimately reducing the use of its services and reducing even further its revenue level. The high cost area carrier and its customers would be penalized for the deployment of basic and advanced telecommunications services. This is contrary to the goals and purposes of the Act and the goals of this NPRM.

Based upon the foregoing unintended consequences to tribal and other high cost telecommunications carriers, MATI must oppose the adoption of the NPRM's proposed classification of wireline broadband services as "information services" not subject to Title II of the Act, at least as to high cost area carriers. Alternatively, MATI would not oppose the NPRM if the FCC exempted high cost area carriers from the scope of the rule and the FCC made it explicit that the adoption of the NPRM will in no way lessen or dilute the amount of funds available for *Federal Support* to existing and future high cost area carriers.

V. Less Drastic Means are Available to Remove Regulatory Barriers to Broadband Deployment

As explained above, the NPRM shift in policy will have a severe adverse impact upon the financial integrity of MATI, other existing and future tribally-owned telecommunications carriers, and other high cost area carriers.²⁰ Adoption of the NPRM not only will create a strong disincentive to invest in advanced telecommunications services but also will threaten the very affordability of existing plain old telephone services in rural areas. Moreover, the deregulation of broadband internet access services for large low cost providers comes at a huge cost because their internet access services would effectively be removed from the numerous competition, universal service, and consumer protection provisions that Congress imposed on common carriers providing telecommunications services. Furthermore, as noted above, the lack of broadband deployment may only be partially based on the current regulatory regime. The economic and technical considerations of the carriers may also be responsible for the lack of deployment. Assuming for the sake of argument that the regulatory regime requires change, there are less drastic measures that can be undertaken without sacrificing the Title II protections of the Act.

From a rural carrier's perspective, the deployment of broadband services in its high cost areas is substantially impacted by the FCC's Rule 54.305. This rule provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high cost universal service support for which the acquired exchanges were eligible prior to their transfer. This rule effectively prohibits new carriers in high cost areas or carriers purchasing exchanges in high cost areas from obtaining the level of *Federal Support*

²⁰ See, Comments of Beacon Telecommunications Advisors, LLC filed in this proceeding.

necessary for the deployment of broadband facilities and services. Changing this rule will have a more direct and profound impact upon the deployment and delivery of broadband service to rural communities than making the changes in the NPRM. As MATI's experience has proven, the elimination of this regulatory barrier enabled MATI to obtain the necessary financing secured by *Federal Support* to deploy its state of the art system. Rather than the wholesale policy shift as proposed in the NPRM, a more modest and efficacious change in regulations is available to the FCC to incentivize the deployment of broadband services. The FCC should change Rule 54.305 to allow new carriers access to *Federal Support* irrespective of the eligibility of the prior ILEC. This rule change should be subject to the telecommunication carrier's commitment to the build-out of the advanced broadband facilities in rural high cost areas.

Additionally, the FCC could encourage the deployment of broadband infrastructures to key community or tribal educational facilities, health service facilities, community central office points of presence, and local, tribal and federal governmental facilities in high cost areas where the deployment to residential service areas is too costly for an increased support program. This deployment would assist in filling in necessary backbone infrastructure for future commercial and residential expansion. This approach would at least enhance necessary public health, safety and welfare services, and provide the facilities for future expansion.

In summary, there are less drastic approaches available to incentivize or reduce regulatory barriers to deployment of broadband than those proposed in the NPRM. The FCC should be very cautious about making the radical change incorporated in the NPRM with the attendant severe consequences upon high cost area carriers explained above.

VI. Conclusion

Based upon the foregoing, MATI urges the FCC not to adopt the NPRM. The FCC should maintain its commitment to MATI as well as other Indian tribes under the United States' trust responsibility by assuring that Indian tribes have the opportunity to meaningfully participate in the advancements made in the telecommunications industry.²¹ Unfortunately, the NPRM is inconsistent with this responsibility.

RESPECTFULLY SUBMITTED

COHEN & COHEN, P.A.

By /s/ David S. Cohen
David S. Cohen
Jane C. Cohen
P.O. Box 789
Santa Fe, New Mexico 87504-0789
(505) 983-9277

Attorneys for Mescalero Apache Telecom, Inc.

E:\Microsoft Word\Mescalero GTE\MATIComments to Notice FCC

²¹ See *Twelfth Report and Order at paras. 5, 22-23*; See also *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207, at 3 (released June 23, 2000) (Indian Policy Statement) (citing *U.S. v. Mitchell*, 463 U.S. 206 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942); (citing *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *United States v. Creek Nation*, 295 U.S. 103 (1935); *United States v. Pelican*, 232 U.S. 442 (1941); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886)).